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No. 03-506

Supreme Court, U.S.
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In the Supreme Court of the United States

CHRISTOPHER SPIERER; MARION SPIERER,
Petitioners,

v.

FEDERATED DEPARTMENTAL STORES, INC.;
ALLIED STORES CORPORATION;
BLOOMINGDALES DEPARTMENT STORES, INC.,
Respondents.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The decision of the Sixth Circuit should not be allowed to stand, because it misinterprets the "powers" referred to in 11 USC 105(a) as a grant of jurisdiction to US bankruptcy judges, while at the same time determined Congressional restrictions on such judges, to be non- jurisdictional factors, which can be waived. The decision creates confusion between the judicial powers of a US bankruptcy judge and subject matter jurisdiction. In the present case, this resulted in the Sixth Circuit condoning interference in state court proceedings by a US bankruptcy judge who exceeded Congressional restrictions and seriously prejudiced Petitioners' rights to a state trial of their personal injury claims.

Respondents' Brief in Opposition to the Petition for Writ of Certiorari also demonstrates the confusion between the powers of US bankruptcy judges and their subject matter jurisdiction. This confusion is highlighted by the fact that the Second, Third and Fifth Circuits, unlike the Sixth Circuit, do not interpret the 11 USC 105(a) "powers" as a grant of jurisdiction to US bankruptcy judges. Clarification of this and related issues raised in the Petition, is of importance to the enforcement of both private rights and state rights.

FACTUAL ALLEGATIONS

Respondents make numerous tendentious assertions of fact in their Brief in Opposition which are not germane to the basis of this petition but which seek to place petitioners in an unfavorable light. (Res. Br. 3- 6) Petitioners are, for example, alleged to be pursuing a "relentless campaign to thwart the efforts of the Bankruptcy Court and the Arbitrator to settle" [their] "underlying personal injury case." (Res. Br. 6) These and similar assertions are denied and the letters of petitioners'

former attorney, Paul Marber, of 3/6/2000 (APX 387) and 6/29/1999, (APX 301), which delineate the difficulties in dealing with respondents' attorneys, are referred to.

REASONS FOR GRANTING THE WRIT

1. UNIFORM COMPLIANCE WITH CONGRESSIONAL LIMITATIONS ON BANKRUPTCY JUDGES

It is important that Congressional regulation of US bankruptcy judge jurisdiction is uniformly applied throughout all of the US Federal Judicial Circuits. Congress has *inter alia,* sought to regulate such jurisdiction in the context of "core proceedings". If the Sixth Circuit's decision is allowed to stand, compliance with such Congressional regulation may be waived or disregarded by agreement between parties in that Judicial Circuit, but not in others.

"Core proceedings" in bankruptcy are defined as matters which constitute public rights created by Federal statute, but not private rights. See, ***In re Royal***, 197 BR 341, 347- 348. Congress has placed restrictions on US bankruptcy judges from dealing with non- core proceedings, especially where the determination of personal injury claims is involved. See, 28 USC 157(b)(2)(B) and(O). In addition, US bankruptcy judges have no jurisdiction to deal with "related non- core proceedings, unless the District Court specifically refers such matters to them "with ***the consent of all the parties*** to the proceedings". Absent this, only the District Court can enter orders in related non- core proceedings. See, 28 USC 157(c)(2) and(c)(1).

Respondents do not deny in their Reply Brief, that in June 1990, US bankruptcy judge Aug determined that Petitioners'

state subrogated claims against Respondents' insurer, Liberty Mutual, ***were not part of respondents Chapter 11 reorganization***. Nor do they deny that the subsequently confirmed 1992 Plan of Reorganization exempted personal liability claims against Liberty Mutual from its provisions and operation.

Respondents also do not deny that no consent was given at any time to the District Court to refer Petitioners' state claims to US bankruptcy judge Perlman as a related non- core proceeding.

It is clear that Perlman's 1997 order staying Petitioners' subrogated personal injury claims against Liberty Mutual, and forcing them into ADR procedures, (failing which, reference to his court, or the Ohio District Court for ultimate determination), violated specific Congressional restrictions on the jurisdiction of bankruptcy judges.

Unlike the Sixth Circuit, the Second, Third and Fifth Circuits consider bankruptcy judge jurisdiction in terms of "core proceedings" under 28 USC 157, not under the provisions of 11 USC 105(a), See, for example, ***In re Johns- Manville Corp***. 801 F 2nd. 60, 63- 64 (Second Cir.) According to this approach, such Congressional limitations cannot be waived.[1]

If the Sixth Circuit's decision in the present matter is allowed to stand it will create an uneven enforcement of Congressional regulation of US bankruptcy judge

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[1] Like the Congressional regulation of diversity jurisdiction under 28 USC 1332, such issues "cannot be waived or overcome by agreement by the parties". ***Mitchell v. Maurer*** 293 US 237 at 244.

jurisdiction. Congressional regulation under 28 USC 157, for example, can be rendered nugatory in the Sixth Circuit in cases where parties default in objecting to jurisdictional excess. This opens the door not only to the weakening of District Court control and oversight of US bankruptcy judges, but to the aggrandizement of their jurisdiction by private agreement between the parties.

2. CONFUSION OF JUDICIAL POWERS WITH SUBJECT MATTER JURISDICTION

The Sixth Circuit's decision creates confusion between a US bankruptcy judge's judicial powers and subject matter jurisdiction.[2] Respondents Brief in Opposition reflects this confusion, but only addresses one aspect of bankruptcy judge Perlman's 1997 order, namely the use of ADR procedures to resolve personal injury claims. Respondents do not address the fundamental question of subject matter jurisdiction under 28 USC 157(b)(2)(B) and(O) (core proceedings) and 28 USC 157(c)(1) and (c)(2), (related non- core proceedings). They are also silent on the bankruptcy judge's lack of Congressional authority to refer matters to the District Court on the failure of ADR procedures. [3]

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[2] By contrast the Fifth Circuit's approach in matter of ***Zale Corp.*** 62 F.3rd. 746, 751 carefully distinguishes between the judicial power and jurisdiction of US bankruptcy judges..

[3] US bankruptcy judges have no jurisdiction to refer cases to the District Court. See, ***Centrust Savings Bank v. Love*** 131 BR 64 , 66, citing ***Benchic v. Century Entertainment Corp***. 20 BR 126, 127. It is the District Court which refers cases to US bankruptcy judges. See ***Celotex Corp. v. Edwards*** 514 US 300 ;115 S. Ct. 1493 at 1498.

Respondents reference to 11 USC 105(d) as a source of authority for ADR resolution of personal injury claims. (Res. Br. 13), confuses a bankruptcy judge's judicial powers with subject matter jurisdiction, since 11 USC 105(d)(1) and(2) only address matters to be included in pre- trial conference orders. [4]

But the resolution of personal injury claims are non- core proceedings under 28 USC 157(b)(2)(B) and (O) and US bankruptcy judges can only issue orders in such matters on specific referral by the District Court following the consent of all parties. (See 28 US 157(c)(2))

The confusion is further evident in respondents' associated contentions on "inherent authority" (Res. Br. 12) and Rule 16 of the Federal Rules of Civil Procedure (Res. Br. 11), as sources of ADR authority for bankruptcy judges. In the latter regard, Rule 16(c)(9) FRCP [5] like 11USC 105(d), refers to pre- trial conference procedures. Significantly, in the present case, bankruptcy judge Perlman convened no pre- trial conference in 1997 before determining respondents' adversarial motion for a stay and reference to ADR.

Respondents remaining contentions on possible sources of ADR authority for US bankruptcy judges over personal injury claims, not only confuse judicial powers with subject matter jurisdiction but are also irrelevant to the specific facts

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[4] In fact, the list of such orders under 11 USC 105(d)(2)(A) and (B) (i) - (vi), does not specifically include the authorization of ADR procedures.

[5] Made applicable to adversary proceedings in bankruptcy by Rule 7016 of the Federal Rules of Bankruptcy Procedure.

of the petition. For example, respondents rely on 11 USC 1123(b)(6) which requires a plan of reorganization to include "any other appropriate provision" not inconsistent with the Bankruptcy Code. Respondents contend generally, that reorganization plans can provide ADR mechanisms to liquidate claims.(Res. Br. 11- 12). While this is correct, it not only confuses powers with subject matter jurisdiction, but has no relevance to the facts in the case, since:

a) Bankruptcy judge Aug previously exempted personal injury claims against Liberty Mutual from the Chapter 11 bankruptcy reorganization, because, being relatively few, they did not exhaust the insurer's liability cover.

b) Debtors' 1992 reorganization plan, accordingly, did not provide ADR remedies for personal injury claims.

c) Bankruptcy judge Perlman's 1997 order was made five years ***after*** final confirmation of respondents' reorganization plan. [6]

d) The ***A.H. Collins***, Dalkon Shield cases, referred to by respondents, concerned a mass tort bankruptcy in which the personal injury claims would have exceeded the available insurance cover. The ***District Court*** in Collins, accordingly approved a reorganization plan in which personal injury claimants could ***choose*** to obtain percentage payments of their

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[6] Judge Perlman's order was not intended to, and did not alter the 1992 reorganization plan, which had been substantially consummated by 1997 and could not be modified. See 11 USC 1127(b).

claims from the debtors assets, under the plan's ADR procedures, (called the "Claims Resolution Facility"), ***or*** sue debtors insurers in the state courts for whatever amounts they might recover. [7]

Respondents further reference to 28 USC 651, (Alternative Dispute Resolution Act) as a source of authority for Perlman's 1997 ADR order is problematic since the act only came into operation in 1998.(Res. Br. 10, 11) As indicated in petitioners' petition, page 5, no Congressional authority existed in 1997 for such procedures. [8]

The substantial confusion which the Sixth Circuit's decision creates between the judicial powers and subject matter jurisdiction of US bankruptcy judges, and the contrary approach of the Second, Third and Fifth Circuits, requires clarification by this Court.

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[7] See ***In re A.H. Robins*** 880 F. 2nd. 684 at 701

[8] It is uncertain whether, or to what extent the1998 provisions for such procedures apply directly to US Bankruptcy judges. Since the 1998 enactment of 28 USC 654(a) mirrors the referral by consent provisions of 28 USC 157(c)(2), it would appear that the ADR procedures may only be used by US bankruptcy judges on specific referral from the District Court, following the consent of the parties. Even if the 1998 provisions applied in 1997, which they did not, there was no consent to any District Court referral. Further, petitioners' personal injury claims exceeded the monetary limit on ADR procedures, contained in the present 28 USC 654(c), by several $ millions.

3. UNIFORM APPLICATION OF CONGRESSIONAL ANTI- INJUNCTION ACT PROVISIONS

The Sixth Circuit's finding that Congressional restrictions on US bankruptcy judges can be waived, as non- jurisdictional factors, impacts on the uniform enforcement of the Anti-Injunction Act (28 USC 2283). Though the provisions of 11 USC 105(a) are broad enough to include stays on state court proceedings and have been accepted as an "expressly authorized exception" to the Anti- Injunction Act, the exemption only applies if bankruptcy judges issue such stays in the "proper circumstances". See ***Davis v Sheldon*** 691 F. 2nd. 176, 177-178; ***In re Baptist Medical Center of New York*** 80 BR 637, 641.

According to the approach of the Second, Third and Fifth Circuits, 11 USC 105(a), does not create jurisdiction, and "proper circumstances", in the form of subject matter jurisdiction, must be sought in Congressional restrictions on US bankruptcy judges. See ***In re Johns- Manville Corp***. 801 F 2nd. 60, 63, where the Second Circuit stated that:

> "Section 105(a) does not, however broaden the bankruptcy court's jurisdiction, which must be established separately under 28 USC 157."

In reviewing the appropriateness of the bankruptcy judge's stay, the Sixth Circuit's decision contained no consideration of the Congressional restrictions contained in 28 USC 157, since it found that all such restrictions could be, and were, waived in the instant case.[9] In the Second, Third and Fifth

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[9] Petitioners specifically urged the Sixth Circuit, in both written and oral argument, to consider the Congressional restrictions

Circuits, such Congressional restrictions are jurisdictional. They consequently cannot be waived and must be considered in determining the appropriateness of such stays and the 11 USC 105(a) exemption to the Anti- Injunction Act.

The Sixth Circuit's decision thus creates a lack of uniformity in the application of the Anti- Injunction Act, in that Judicial Circuit, in cases where parties are deemed to have waived such Congressional restrictions. In such cases, the determination of "proper circumstances", exempting the operation of the Anti- Injunction Act, does not include a review of Congressional restrictions.

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contained in 28 USC 157, in the context of the appropriateness of the1997 order. Even if the Sixth Circuit was correct in finding that the order did not violate Article 111 requirements, (which is denied), there was never- the- less an absence of Federal subject matter jurisdiction under 28 USC 157. The case relied on by the Sixth Circuit in applying a constitutional test, namely ***Commodity Futures Trading Commission v Schor*** 478 US 833, was not a bankruptcy case and dealt with a different problem, namely, whether a set of Congressional provisions departed from Article 111 requirements.

CONCLUSION

This Court should grant this petition and resolve the far reaching difficulties which the Sixth Circuit's published decision creates for the uniform administration of the US Bankruptcy Code.

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